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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Dr. Carlos Manuel Falla y Alvarez respectfully prays that a writ of certiorari issue to review judgment of the United States Court of Appeals, Fifth Circuit, entered on March 9, 1967, with the timely petition for rehearing denied April 4, 1967, which did reverse a judgment entered on September 4, 1964 in the United States District Court for the Southern District of Florida, Miami Division, in favor of Dr. Alvarez, Petitioner herein.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is not reported.

The opinion of the United States Court of Appeals, Fifth Circuit, is reported in 374 F. 2d 92.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to U. S. C. A., Title 28, Section 1254, (1), and Rule 19 (b).

QUESTIONS PRESENTED FOR REVIEW

Two questions are presented by this record. They are:

1. An insured owned life insurance policies which provided that the policy and application therefor constitute the entire contract which cannot be changed or modified except by written consent of the company over the signature of the president, vice-president, secretary or actuary; nor could the company be bound by any promise or representation affecting this contract by anyone other than the above-mentioned officers of the company. The insurance co pany issued certain alleged monetary agreements thereafter which were called "convenio monetario." The "convenio monetario" was not signed by any of the above-mentioned officers of the company, and purported to change the terms of the policies from policies payable in United States dollars to policies payable in national currency of Cuba. Does the "convenio monetario" bind the insured thereby, amending the original policies?

2. At the trial of this cause of action before the United States District Court, the insured testified as to the cash value of each of the policies involved. The in-

surance company presented no evidence concerning cash value of the said policies, nor did counsel for the company cross-examine the insured as to his determination of the cash value of said policies. The trial Court adjudicated the cash value of the policies in favor of the insured. There was no finding by the District Court that judgment was entered requiring the insurance company to pay an American dollar for each peso owed in Cuba. The United States Court of Appeals, Fifth Circuit, reversed the District Court's judgment and held that judgment had been entered in favor of the insured, in the Court below, requiring the company to pay an American dollar for a Cuban peso. Should the Court of Appeals disturb or interfere with the judgment of the trial Court when the trial Court's decision is supported by competent evidence?

STATEMENT OF THE CASE

The insured brought suit against the defendant insurance company to recover the cash surrender values of six life insurance policies. Applications for the policies were made in Cuba and they were accepted and issued by the company at its home office in New Orleans, Louisiana. The insurance policies involved are as follows:

(a) Policy 254-900 was issued February 23, 1934. The initial premiums were paid in dollars. The cash surrender value is $995.00 payable at New Orleans, Louisiana.

(b) Policy 324-766 was issued April 14, 1939. The initial premiums were paid in dollars. The cash value

of this policy is $3,114.00, payable at New Orleans, Louisiana.

(c) Policy 387-428 was issued March 16, 1944. The initial premiums were paid in dollars. The cash surrender value is $14,346.00, payable at New Orleans, Louisiana.

(d) Policy 414-798 was issued April 25, 1946. The initial premiums were paid in dollars. The cash surrender value is $619.00, payable at New Orleans, Louisiana.

(e) Policy 441-506 was issued August 4, 1947. The initial premiums were paid in dollars. The cash surrender value is $8,500.00, payable at Havana, Cuba.

(f) Policy 636-489 was issued March 19, 1959. The initial premiums were paid in Cuban pesos. The cash surrender value is $7,347.00, payable at Havana, Cuba.

The insurance policies contained no restrictions as to residence, travel or employment. The policies do, however, contain a provision that,

> "This policy and the application therefor, a copy of which is attached hereto and made a part hereof, constitute the entire contract, which cannot be changed or modified except by the written consent of the company over the signature of the president, vice-president, secretary or actuary; nor shall the company be bound by any promise or representation affecting this contract made at any time by any person other than the above mentioned officers of the company, nor shall any condition be waived nor the

time of payment of a premium be extended, except by the written consent of the company, over the signature of one of the said officers." (R. 213).

At the trial of this cause, the Plaintiff insured testified as to the cash values of each of the policies involved. (R. 214).

In 1952, the Defendant company sent to the insured certain papers called "convenio monetario." These papers purported to amend the policies as follows:

"In consideration of the Pan-American Life Insurance Company accepting payments of the premiums on the above numbered policy in Cuban Currency in Cuba, in lieu of the payment of United States Dollars in New Orleans, Louisiana, it is requested that my policy be amended so that all premiums, all benefits and all claims payable under its terms be demandable and payable in the National currency of Cuba in Havana, Cuba **on the basis of one Peso for each Dollar,** required by the contract, and it is agreed that upon receipt of this request by the Pan-American Life Insurance Company, it shall become a part of the contract subscribed by the undersigned and the Company."

The required officers, as provided under the terms of the policy, did not sign the "convenio monetario" papers, nor did any company officer sign the said papers. The trial Court, the United States District Court, refused to apply the "convenio monetario" papers to alter the

policies involved as to place of payments or currency, rendering its judgment in favor of the Petitioner-Plaintiff. The Court of Appeals reversed, holding that the said "convenio monetario" was a valid agreement.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT AND BRIEF ARGUMENT IN SUPPORT THEREOF

1. The Court of Appeals has rendered its decision in this case in direct conflict with the decision of the Florida Supreme Court in **Gulf Life Insurance Co. vs. Conklin,** 16 So. 2d 337, which is still the law of Florida. This case concerns itself with question one of the insured's Petition for Writ of Certiorari. The question is an important one, as this decision will affect those many policy holders similarly situated.

2. The Court of Appeals has departed from the accepted and usual course of judicial appellate law as to call for an exercise of this Court's power of supervision. In the above-styled case, the trial court determined the cash surrender values of each of the policies involved, relying on the uncontradicted testimony of the insured. The Court of Appeals reversed, holding that the alleged "convenio monetario" was a valid agreement which amended the original policies from dollar policies to Cuban peso policies.

The effect of this decision of the Court of Appeals is to disregard competent evidence relied on by the trial Court for its decision, and to substitute its judgment for that of the trial Court. The decision conflicts with basic, accepted principles of Appellate law. See **In Re Baldridge's**

Estate, 74 So. 2d 658; **Bergh v. Bergh** (1964 Fla.) 160 So. 2d 145; **Bittner v. Walsh**, (1961 Fla. App.) 132 So. 2d 799; **Allyn v. Abad** (C.C.A.N.J. 1948) 167 Fed. 2d 901; **Moore v. United States** (C.C.A.Pa. 1963) 322 Fed. 2d 372.

CONCLUSIONS

The "convenio monetario" papers, translated and referred to as monetary agreements, were not executed by the insurance company as appears on its face and therefore could not alter the policy terms especially as to currency or place of payment. The Court of Appeals decision directly conflicts with the **Gulf Life Insurance Co. v. Conklin**, 16 So. 2d 337 decision of the Florida Supreme Court.

The Court of Appeals also disregarded the competent evidence relied on by the trial Court as a basis for its decision and substituted its own findings for those of the District Court.

It is, therefore, submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

SAMUEL SHERADSKY
1895 S. W. Third Avenue
Miami, Florida 33129

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

v.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

Appendix to Petition for a Writ of Certiorari to The United States Court of Appeals, Fifth Circuit

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DR. CARLOS MANUEL FALLA y ALVAREZ

v.

PAN AMERICAN LIFE INSURANCE COMPANY

No. 63-184-CIV-EC

United States District Court
Southern District of Florida
Miami Division

September 4, 1964

Before EMETT C. CHOATE

THIS CAUSE having come on for trial and the Court

having reviewed the Stipulations and evidence of the parties, having heard the testimony of the witnesses and being otherwise advised in the premises, it is thereupon

CONSIDERED, ORDERED and ADJUDGED that Final Judgment be and it is hereby entered in favor of the Plaintiff, DR. CARLOS MANUEL FALLA Y ALVAREZ, and against the Defendant, PAN-AMERICAN LIFE INSURANCE COMPANY, a Louisiana Corporation, in these respective sums, for the following Pan American Life Insurance Policies, to wit:

Policy No. 254-900	$ 995.00
Policy No. 324-766	$ 3,114.00
Policy No. 387-428	$14,346.00
Policy No. 414-798	$ 619.00
Policy No. 441-506	$ 8,500.00
Policy No. 636-489	$ 7,347.00

together with lawful interest at 6% from November, 1960, in the sum of $8,666.84, and attorney's fees in the amount of $5,230.54 and legal costs in this case incurred, said costs to be taxed by the Clerk of this Court, and that said Plaintiff have execution therefor, it is

DONE and ORDERED at Miami, Dade County, Florida, this 4 day of September A. D., 1964.

DR. CARLOS MANUEL FALLA y ALVAREZ

v.

PAN AMERICAN LIFE INSURANCE COMPANY

No. 63-184-CIV-EC

United States District Court
Southern District of Florida

September 4, 1964

This is an action brought by Carlos Manuel Falla y Alvarez to recover the cash surrender value of the benefits under a series of six life insurance policies on his life, issued by Pan-American Life Insurance Company. The cause came on before the Court for trial on February 18, 1964. The Court having reviewed the pleadings, stipulations, depositions, and having heard the testimony together with argument and briefs of counsel, and being otherwise fully advised in the premises does here enter its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This cause involved the same general factual background and issues of law as those decided in **Blanco v. Pan-American Life Insurance Company**, 221 F. Supp. 219 (S. D. Fla. 1963). The general statements of historical fact and findings common in all causes as reported in that opinion are here adopted as findings in this cause.

2. The following policies are involved:

(a) Policy 254-900 was issued under date of Febru-

ary 23, 1964. The initial premiums were paid in Dollars. The cash surrender value of this policy is $995.00.

(b) Policy 324-766 was issued April 14, 1939. The initial premium was paid in Dollars. The cash surrender value of this policy is $3,114.00.

(c) Policy 387-428 was issued March 16, 1944. The initial premium was paid in Dollars. The cash surrender value is $14,346.00.

(d) Policy 414-798 was issued April 25, 1946. The initial premium was paid in Dollars. The cash surrender value is $619.00.

(e) Policy 441-506 was issued August 4, 1947. The initial premium was paid in Dollars. The cash surrender value is $8,500.00.

(f) Policy 636-489 was issued March 19, 1959. The initial premium was paid in Cuban pesos. The cash surrender value is $7,347.00.

3. The applications for all the policies were made in Cuba. The applications and the policies when issued were all in the Spanish language. In each case the applications were sent to the home office of the defendant in New Orleans, Louisiana and were there accepted and the policy issued. The policies were then forwarded to the Cuban agent of the Company in Cuba who authenticated the signature of the Company officers before a Cuban Notary before delivery to the insured.

4. The four policies, earliest in date (listed as (a)

through (d) above) were all originally United States Dollar contracts with premiums and benefits payable in New Orleans at the company's home office. The latter two policies (listed as (e) and (f) above) were Cuban peso contracts payable in Cuba. In 1952 at various times, the four dollar contracts were amended by monetary agreements executed by the parties as follows:

> "In consideration of the Pan-American Insurance Company accepting payments of the premiums on the above numbered policy in Cuban Currency and in Cuba, in lieu of the payment of United States Dollars in New Orleans, Louisiana, it is requested that my policy be amended so that all premiums, all benefits and all claims payable under its terms be demandable and payable in the National currency of Cuba in Havana, Cuba, **on the basis of one Peso for each Dollar** (emphasis added), required by the contract, and it is agreed that upon receipt of this request by the Pan American Life Insurance Company, it shall become a part of the contract between the undersigned and the Company."

5. The plaintiff is a former Cuban national residing and domiciled in Florida in this judicial district. He is not only a Cuban refugee, but has also been "blacklisted" by the Castro government, first and originally for being a man of property and at a later date for his alleged participation in the Bay of Pigs invasion. The defendant is a corporation, organized and existing under the laws of the State of Louisiana, with a principal place of business in the City of New Orleans, Louisiana. Diversity of citizenship exists.

6. The plaintiff has complied with all conditions precedent contained in the policies, including payment of the premiums thereunder. The plaintiff has made demand for the cash value of the policies prescribed by the terms of same. Demand was made for same on November 30, 1960, and was refused by the defendant. The defendant has not tendered payment either in dollars or in pesos or otherwise in response to the demands.

Opinion and Conclusions of Law

This Court's conclusions of law and opinion was fully expressed on identical facts in **Blanco v. Pan-American Life Insurance Co.**, 221 F. Supp. 219 (S. D. Fla. 1963). The cause now before the Court is of course most similar to the **Zabaleta** factual situation discussed therein because of the monetary agreement.

It should be noted that since the opinion in the **Blanco** case was written, that the Supreme Court of Louisiana has reversed the lower court of the state in **Ajuria v. Pan-American Life Insurance Co.**, 161 So. 2d (La. 1964). In reaching its decision that court approved the language used by this court in the **Blanco** case. It now appears that the courts of both Louisiana and Florida are alike in rejecting the contentions of the defendant. In Florida, the Supreme Court has rejected certiorari in **Pan American Life Insurance Co. v. Raij**, 164 So. 2d 204 (Fla. 1964). The various decisions of the Third District Court of Appeal rejecting the contentions of the defendant insurance company stand as the present law in Florida. See, **Pan American Life Insurance Co. v. Raij**, 156 So. 2d 785 (Fla. App. 1963); **Pan American Life Insurance Co. v. Recio**, 164 So. 2d 197 (Fla. App. 1963).

The United States Supreme Court upon Petition for Certiorari invited the views of the Solicitor General of the United States in regard to the questions presented by these cases. Mr. Archibald Cox in his pleadings before the high Court, filed in May, 1964, advised the Court that in his opinion the Defendant's contentions as to the defense presented by either the Bretton Woods Agreement or the Act of State doctrine should be rejected, and indicated further that the Cuban decrees had no extraterritorial application. Finally, the applicability of the International Monetary Fund Agreement to these cases seems moot since Cuba withdrew from the Fund in April of 1964.

The United States Supreme Court denied certiorari on the cases from both Louisiana and Florida. **Pan American Life Insurance Co. v. Lorido**, 377 U. S. 990 (1964); **Pan-American Life Insurance Co. v. Recio**, 377 U. S. 990 (1964); and **Pan-American Life Insurance Co. v. Ajuria**, 377 U. S. 998 (1964).

This Court had been withholding its decision in this cause awaiting the decision of the Court of Appeals for the Fifth Circuit on the appeal in the **Blanco** case, however, in view of all these developments, I feel that decision should no longer be withheld, for as said by the Supreme Court of Louisiana:

> We find untenable the suggestion of counsel that this court should await the United States Supreme Court's action in regard to several cases pending before it on applications for writs, ... To require this refugee, who is in a strange land and possibly in dire need to wait indefinitely for a final adjudication of his claim would be

a travesty on justice; and we think it would be folly to suggest that he return to Cuba, for his effort to secure relief there might well wind up in his "liquidation." 161 So. 2d at 74.

Judgment in favor of the plaintiff for the cash surrender value of each of the policies at issue will be entered. The parties have stipulated that if judgment be entered in favor of the plaintiff, it may include an allowance for attorney's fees in the amount of 12½% of the amount recovered, and judgment in accordance with the stipulation will be entered. Prevailing counsel shall submit form of judgment.

Entered at Miami, Florida this the 4th day of September, 1964.

(Signed) EMETT C. CHOATE

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant,

versus

DR. CARLOS MANUEL FALLA y ALVAREZ,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(March 9, 1967.)

Before COLEMAN and DYER, Circuit Judges, and ESTES, District Judge.

DYER, Circuit Judge: Dr. Alvarez brought suit against the defendant, PAN-AMERICAN LIFE INSURANCE COMPANY, to recover the cash surrender values and accumulated dividends on six life insurance policies.[1]

The applications for all the policies were made in Cuba. The applications and the policies when issued were all in the Spanish language. The applications were sent to the home office of the defendant in New Orleans, Louisiana, where they were accepted and the policies issued. The policies were then sent to the Cuban Agent of the Company in Cuba, who authenticated the signature of the Company officers before a Cuban Notary before delivery to Dr. Alvarez.

The first four policies were originally issued as United States Dollar contracts with premiums and benefits payable at the company's home office in New Orleans. The latter two policies were Cuban peso contracts payable in Cuba. In 1952 the four dollar policies were amended by monetary agreements executed by the parties as follows:

> "In consideration of the Pan-American Life Insurance Company accepting payments of the premiums on the above numbered policy in Cuban Currency in Cuba, in lieu of the payment of United States Dollars in New Orleans, Louisiana,

[1]Policy 254-900 issued February 23, 1964; Policy 324-766 issued April 14, 1939; Policy 387-428 issued March 16, 1944; Policy 414-798 issued April 25, 1946; Policy 441-506 issued August 4, 1947; and Policy 636-489 issued March 19, 1959.

it is requested that my policy be amended so that all premiums, all benefits and all claims payable under its terms be demandable and payable in the National currency of Cuba in Havana, Cuba, on the basis of one Peso for each Dollar, required by the contract, and it is agreed that upon receipt of this request by the Pan-American Life Insurance Company, it shall become a part of the contract between the undersigned and the Company."

At the time that Dr. Alvarez made demand upon the defendant for payment of the cash values of the policies, the Cuban Peso was being bought and sold for 23 and 24½ cents American money.

In a non-jury trial, the district court found that Dr. Alvarez had complied with all conditions precedent contained in the policies and had made demand for the cash values of the policies. Judgment was entered requiring the defendant to pay to Dr. Alvarez an American dollar for each Peso owed in Cuba on the theory that the "official exchange rate" required this, notwithstanding that the Cuban Peso was worth considerably less than a dollar at all times pertinent. The defendant appealed.

We had the identical situation here presented in Pan American Life Insurance Company v. Zabaleta, 5 Cir. 1966, 362 F. 2d 167. There we said:

"The district court permitted recovery on a dollar for a peso basis. This conclusion was reached, as in the DIEGO case, on the 'official exchange rate' theory with which we have disagreed in

DIEGO and must disagree with respect to Zabaleta. The district court also reached the conclusion that the one for one ratio was contemplated by the parties and made a part of the terms of the policy amendment. We are unpersuaded that, in 1952, when the amendment was made, it was contemplated by the parties that demand might be made for payment in dollars. Rather, we think, it was intended by the parties to change the obligation to pay a stated number of dollars to an obligation to pay a stated number of pesos, and this without regard to future variations in the respective values of the two currencies. In our opinion Miss Zabaleta should recover on the same basis as Diego, with her judgment measured by the dollar value of the pesos which she is entitled to have awarded under the policy provisions."

Dr. Alvarez does not attempt to answer **Zabaleta.** He claims that the peso monetary agreements were not properly executed. But this issue was not raised below and cannot be raised for the first time on appeal. Even had the issue been raised below, the failure of Dr. Alvarez to cross-assign error as to the district court's finding that the monetary agreements were properly executed precludes consideration of such contention on appeal. **North Texas Producers Ass'n v. Metzger Dairies, Inc.,** 5 Cir. 1965, 348 F. 2d 189.

Zabaleta was decided by this court after the district court decided this case. The judgment of the district court must be and it is reversed and remanded for reconsideration in the light of **Zabaleta.**

REVERSED and REMANDED.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant,

v.

DR. CARLOS MANUEL FALLA y ALVAREZ,
Appellee.

No. 22230

In The

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

April 4, 1967

ON PETITION FOR REHEARING

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

(Signed) EDWARD W. WADSWORTH,
Clerk

TRANSLATION OF "CONVENIO MONETARIO"

Monetary Agreement

To form an integral part of Policy No. _____.

In consideration of the fact that the Pan-American Life Insurance Company accepts that payment of the premiums of the policy cited in the caption be made in Cuban currency and in the Republic of Cuba instead of making such payment at New Orleans, Louisiana, in United States Dollars, it is requested that my policy be amended so that all premiums, benefits and claims payable in accordance with its terms be demandable and payable in the national currency of the Republic of Cuba at Havana, Cuba, on the basis of One Peso for each Dollar payable under the contract, it being agreed that upon Pan-American Life Insurance Company's receiving this request, it shall form an integral part of the contract made between the undersigned and the Company.

Dated this ____ day of _____, 195__. _____

POLICY OWNER

EXCERPT OF APPELLEE'S TRIAL TESTIMONY

Q What are the cash values of each of these policies? Did you determine that?

A I calculated it several weeks back. Policy No. 254900, $995.00. Policy No. 324776, $3,114.00. Policy No. 387428, $14,346.00. Policy No. 414798, $619.00. Policy No. 636489, $7,347.00. Policy No. 441506, $8,500.00. (R. 214).

SUPREME COURT, U. S.
FILED
JUL 24 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 351

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

v.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

Supplementary Appendix to Petition for a Writ of Certiorari to The United States Court of Appeals, Fifth Circuit

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SAMUEL SHERADSKY
1895 S. W. Third Avenue
Miami, Florida

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 351

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

v.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

Supplementary Appendix to Petition for a Writ of Certiorari to The United States Court of Appeals, Fifth Circuit

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22230

D. C. Docket No. 63-184-M-Civil Action

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant,

v.

DR. CARLOS MANUEL FALLA y ALVAREZ,
Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before COLEMAN and DYER, Circuit Judges, and ESTES, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellee, Dr. Carlos Manuel Falla y Alvarez, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 9, 1967

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant,

v.

DR. CARLOS MANUEL FALLA y ALVAREZ,
Appellee.

No. 22230

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING
(April 4, 1967)

Before COLEMAN and DYER, Circuit Judges, and ESTES, District Judge

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

LIBRARY
SUPREME COURT, U. S.

JUL 15 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 351

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

JAMES A. DIXON
900 Dade Federal Building
Miami, Florida 33131
and
SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The Fifth Circuit.

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Fifth Circuit is reported at 374 F.2d 92. This

NOTE: Unless otherwise indicated, all emphasis is supplied.

opinion reverses the final judgment of the United States District Court for the Southern District of Florida which appears at R. 247-248 of the printed record in the Court of Appeals. The District Court's Findings of Fact and Conclusions of Law appear at R. 240-246 of the printed record in the Court of Appeals.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Petitioner's timely petition for rehearing in the Court of Appeals was denied on April 4, 1967.

QUESTIONS PRESENTED

Respondent cannot accept the petitioner's statement of the Questions Presented. Both of petitioner's questions are based on incorrect versions of the record. The questions which were decided below may be fairly and accurately stated as follows.

1. Where an insured makes no contention on the trial level that a monetary agreement to a life insurance contract was improperly executed and the trial court finds the agreement was part of the insurance contract, may the insured, without cross-assigning error, claim for the first time on appeal that the agreement was not properly executed by the insurer?

2. Where a written life insurance contract provides for payment in Cuban pesos, does the insured's oral testimony that it was payable in United States dollars preclude the trial court

from finding as a fact that such contract was payable in pesos?

STATEMENT OF THE CASE

Petitioner sued the respondent to recover the cash surrender values and accumulated dividends on six life insurance policies (R. 7-10). Two of the policies were originally issued as peso policies and the remaining four policies were converted into peso policies by monetary agreements executed in 1952. In this regard, the trial court found the facts as follows:

"2. The following policies are involved:

(a) Policy 254-900 was issued under date of February 23, 1964. The initial premiums were paid in Dollars. The cash surrender value of this policy is $995.00.

(b) Policy 324-766 was issued April 14, 1939. The initial premium was paid in Dollars. The cash surrender value of this policy is $3,114.00.

(c) Policy 387-428 was issued March 16, 1944. The initial premium was paid in Dollars. The cash surrender value is $14,346.00.

(d) Policy 414-798 was issued April 25, 1946. The initial premium was paid in Dollars. The cash surrender value is $619.00.

(e) Policy 441-506 was issued August 4, 1947. The initial premium was paid in Dollars. The cash surrender value is $8,500.00.

(f) Policy 636-489 was issued March 19, 1959. The initial premium was paid in Cuban pesos. The cash surrender value is $7,347.00.

3. The applications for all the policies were made in Cuba. The applications and the policies when issued were all in the Spanish language. In each case the applications were sent to the home office of the defendant in New Orleans, Louisiana and were there accepted and the policy issued. The policies were then forwarded to the Cuban agent of the Company in Cuba who authenticated the signature of the Company officers before a Cuban Notary before delivery to the insured.

4. The four policies, earliest in date (listed as (a) through (d) above) were all originally United States Dollar contracts with premiums and benefits payable in New Orleans at the company's home office. The latter two policies (listed as (e) and (f) above) were Cuban peso contracts payable in Cuba. In 1952 at various times, the four dollar contracts were amended by monetary agreements executed by the parties as follows:

> 'In consideration of the Pan-American Life Insurance Company accepting payments of the premiums on the above numbered policy in Cuban Currency and in Cuba, in lieu of the payment of United States Dollars in New Orleans, Louisiana, it is requested that my policy be amended so that all premiums, all benefits

> and all claims payable under its terms be demandable and payable in the National currency of Cuba in Havana, Cuba **on the basis of one Peso for each Dollar** (emphasis added), required by the contract, and it is agreed that upon receipt of this request by the Pan-American Life Insurance Company, it shall become a part of the contract between the undersigned and the Company.'" (R. 241-243).

Having found all six policies to be payable in pesos, the trial court then entered judgment for the insured (R. 247-248) which, as stated by the Court of Appeals below:

> ". . . require[d] the defendant to pay Dr. Alvarez an American dollar for each peso owed in Cuba on the theory that the 'official exchange rate' required this, notwithstanding that the Cuban Peso was worth considerably less than a dollar at all times pertinent. . . . " 374 F.2d at 93.

Respondent appealed to the Fifth Circuit which reversed on the authority of its earlier decision in PAN-AMERICAN LIFE INSURANCE COMPANY v. ZABALETA, (5th Cir.1966), 362 F.2d 167. With reference to petitioner's claim that the monetary agreements were not properly executed, the Fifth Circuit said:

> "Dr. Alvarez does not attempt to answer ZABALETA. He claims that the peso monetary agreements were not properly executed. But this issue was not raised below and cannot be raised for

> the first time on appeal. Even had the issue been raised below, the failure of Dr. Alvarez to cross-assign error as to the district court's finding that the monetary agreements were properly executed precludes consideration of such contention on appeal. North Texas Producers Ass'n. v. Metzger Dairies, Inc., 5 Cir. 1965, 348 F.2d 189." 374 F.2d at 93-94.

As the record shows (R. 62-66, 70-71, 113), petitioner's only contention concerning the monetary agreement on the trial level was that it was invalid for want of consideration. The record likewise shows that petitioner filed no cross-assignments attacking the trial court's finding that the monetary agreements were "executed by the parties" (R. 242).

REASONS FOR DENYING THE WRIT

Respondent urges the Court to deny the petition for a writ of certiorari for the following reasons:

1. The record shows that neither question petitioner attempts to raise is actually before the Court.

2. The Fifth Circuit's opinion below is correct, does substantial justice between the parties, and passes on no issue which should be reviewed by this Court.

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

JAMES A. DIXON

JAMES A. DIXON
900 Dade Federal Building
Miami, Florida 33131

Sam Daniels

SAM DANIELS
1414 duPont Building
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, was mailed to the attorney for Petitioner, SAMUEL SHERADSKY, ESQUIRE, 1895 S. W. Third Avenue, Miami, Florida 33135, this 14th day of July, 1967.

JAMES A. DIXON

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 351

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

vs.

PAN AMERICAN LIFE INSURANCE COMPANY,
Respondent.

AMENDED REPLY BRIEF OF PETITIONER

Respondent's brief attempts to revise Petitioner's questions as being based on incorrect versions of the trial record. Petitioner replies that the record speaks for itself and Petitioner is correct. The Respondent quotes the language of the "Convenio monetario" paper excluding the signatory (App. 13). Only the insured signed this paper, as appears on its face. The required officer, as provided in the policy did not sign in behalf of the Company. Respondent cannot escape these facts, since the policy is also in the record. The trial court clearly refused to recognize or enforce the "convenio monetario" (App. 1-2). Since the trial court ruled in favor of Petitioner, he was therefore unwilling to assign error to the judgment in his favor.

Respondent bases his second question on an incorrect statement of the testimony of the insured, Plaintiff-Petitioner. The insured's testimony as to cash value of each of the policies involved is as follows:

> Q. "What are the cash values of each of these policies? Did you determine that?
> A. I calculated it several weeks back. Policy No. 254900, $995.00. Policy No. 324776, $3,114.00. Policy No. 387428, $14,346.00. Policy No. 414798, $619.00. Policy No. 636489, $7,347.00. Policy No. 441506, $8,500.00."

Counsel for Respondent did not object to this question, nor did he cross-examine the insured. This testimony as to cash value of the policies involved is a statement of fact. Respondent, in its second question, apparently is confused. The question states the insured's oral testimony was that it (policies involved) was payable in United States dollars. Respondent therefore contends that the insured-Petitioner testified that the policies are payable in dollars and not pesos. The question sets forth the insured's testimony as a legal conclusion. This Respondent's contention is incorrect. The Court of Appeals, in its opinion, adopted this same contention of Respondent (R 256).

Respondent's brief, page five paragraph two provides that the trial court found all six policies were payable in pesos. A review of the trial court's judgment clearly shows that this court did not rule that the policies were payable in pesos (App. 1-3). The trial court accepted the insured's uncontradicted testimony as to cash value of

the policies involved. The Court of Appeals reversed substituting its findings and judgment for that of the trial court. The law, as decided by the Supreme Court of the United States, in **Jaffke v. Dunham** (U.S. Ill. 1957, 77 S. Ct., 307, 352 U.S. 280, 1 L. Ed. 2nd 314) provides,

> "A party successful in the District Court shall sustain its judgment on appeal on any ground that finds support in the record."

See also **Daniels v. Allen** (U.S. N.C. 1953) 73 S. Ct. 827, 345 U.S. 946. There was competent evidence to sustain the judgment of the trial court in the record in this case, but the appellate court overlooked this evidence.

Counsel for Respondent in his brief further contends, and he probably believes, that "substantial justice" is done by the Court of Appeals opinion. The record reveals that premium payments were made in dollars and pesos interchangeably to the insurance company (R-208-209).

The Court of Appeals opinion therefore does considerable justice for the Respondent insurance company only. However, if the Court of Appeals opinion is to be affirmed, the insured receives less than twenty percent of his total investment premium payments, while the Respondent has utilized these funds advantageously over the past thirty years to its financial growth and benefit.

CONCLUSION

There is competent evidence to support the trial court's judgment. The Court of Appeals judgment should therefore be reversed.

Respectfully submitted,

s/ Samuel Sheradsky

SAMUEL SHERADSKY
1895 S. W. Third Avenue
Miami, Florida, 33129

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Reply Brief was mailed to the attorneys for Respondent, JAMES A. DIXON, ESQUIRE, 900 Dade Federal Building, Miami, Florida, 33131, and SAM DANIELS, ESQUIRE, 1414 DuPont Building, Miami, Florida, 33131, this _____ day of August, 1967.

SAMUEL SHERADSKY